APPENDIX A — OPINION OF THE SUPREME COURT OF ILLINOIS DATED AND FILED AUGUST 10, 2000

Docket Nos. 87574, 87725, 87726, 87752 cons. — Agenda 8 – May 2000

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

v.

GREGORY MADEJ,

Appellant

(Consul General for the Republic of Poland in Chicago,

Appellant).

JUSTICE RATHJE delivered the opinion of the court:

Defendant, Gregory Madej, appeals from the decision of the circuit court of Cook County denying his petition for relief from judgment (see 735 ILCS 5/2-1401 (West 1998)) and denying his petition for writ of *mandamus* (see 735 ILCS 5/14-101 *et seq.* (West 1998)). Intervenor, Consul General for the Republic of Poland in Chicago, also appeals from the dismissal of the petition for writ of *mandamus*. Moreover, the Consul General appeals the trial court's denial of the Consul General's motion to intervene in the section 2-1401 proceeding.

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BACKGROUND
Original Criminal Proceedings

This case began in 1981 when the police arrested defendant after he led them on a car chase through Chicago. When the officers arrested defendant, his hands and head had blood on them, and his shirt, pants, and undershorts were heavily stained with blood. Defendant also had deep scratches on his face and scratches on his chest, arms, and back.

Shortly thereafter, Barbara Doyle, the owner of the car in which defendant fled from the police, was found in an alley on the northwest side of Chicago. Doyle was naked and had died from multiple stab wounds. Her missing clothes were found in the car defendant was driving.

After defendant was arrested, he told the police that a friend named Hojamoto was driving the victim's car. Defendant rode around with Hojamoto, who jumped from the car a block before the police overtook the car. At trial, defendant testified that he was in the car with the victim and twice had consensual sex with her. He explained that the victim pulled a knife during an argument over drugs. They struggled, and the victim began bleeding. He then threw her from the car and left the scene.

Defendant was convicted of murder, armed robbery, rape, and deviate sexual assault and sentenced to death. This court affirmed defendant's conviction and sentence. *People v. Madej*, 106 Ill. 2d 201 (1985). Thereafter, defendant filed a post-conviction petition and amended it in 1993. The trial

court dismissed defendant's petition, and this court affirmed that dismissal. *People v. Madej*, 177 Ill. 2d 116 (1997). Subsequently, defendant sought leave from this court to file a petition for writ of *mandamus*. This court denied that motion.

Current Proceedings

In July 1998, defendant filed the current action. Defendant filed his section 2-1401 petition in the criminal division. Because of local court rules, defendant filed his petition for writ of *mandamus* in the chancery division.

Defendant's section 2-1401 petition alleged that his rights under the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, and the Consular Convention of 1972 between Poland and the United States,[1] May 31, 1972, 24 U.S.T. 1231, were violated when the police failed to inform defendant that, as a Polish citizen, he had a right to contact a consular official from Poland. Defendant also alleged that, after he was arrested, the United States had a duty to notify the Polish consular that a Polish national had been arrested and detained.[2] Defendant's *mandamus* petition

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1. Unless otherwise noted, we will refer to both treaties singularly as the Vienna Convention.

2. Article 36 of the Vienna Convention provides, in relevant part:

> "(a) consular officers shall be free to communicate with nationals of the sending State and to have access

(Cont'd)

alleged that he was entitled to relief because his conviction and sentence are void under international law.

In December, the Consul General sought leave to intervene in both actions. Judge Albert Green, who was

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(Cont'd)

> to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
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> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph." 21 U.S.T. at 101.

The Consular Convention provides, in relevant part:

> "The appropriate authorities of the receiving State shall immediately inform a consular officer of the sending State of the detention or arrest of any national of the sending State who has not been admitted to permanent residence in the receiving State. In the case of the detention or arrest of a national of the sending State who has been admitted to permanent residence in the receiving State, the appropriate authorities of the receiving State, on the request of such national, shall immediately inform a consular officer of the sending State of such detention or arrest." 24 U.S.T. at 1260.

presiding over the *mandamus* proceedings, granted the Consul General's petition. Thereafter, Judge Green transferred the *mandamus* proceedings to Judge Thomas Fitzgerald, who was presiding over the section 2-1401 proceedings. Thereafter Judge Fitzgerald denied the Consul General's motion to intervene in the section 2-1401 proceeding. Subsequently, Judge Fitzgerald denied both petitions. Defendant and the Consul General now appeal.

While this appeal was pending, this court granted leave to the United Mexican States, the Human Rights Committee of the Bar of England and Wales, and the Consulate General of the Federal Republic of Germany in Chicago to file briefs as *amici curiae*.

ANALYSIS

Section 2-1401 Proceeding

Section 2-1401 of the Code of Civil Procedure provides a method for obtaining relief from a judgment after more than 30 days have passed. See 735 ILCS 5/2-1401(a) (West 1998). A section 2-1401 petition must be filed "not later than 2 years after the entry of the order or judgment." 735 ILCS 5/2-1401(c) (West 1998). Relief sought more than two years after the entry of judgment will not be considered absent a showing that the petitioner was under duress, or a legal disability, or that the grounds for relief were fraudulently concealed. *People v. Caballero*, 179 Ill. 2d 205, 211 (1997).

Here, judgment was entered in 1982. Defendant filed his petition in 1998, approximately 14 years after the limitation period expired. Defendant and the Consul General

acknowledge that the petition is untimely, but argue that this court can consider the merits of the petition because (1) under international law defendant's conviction and sentence are void; (2) the Consul General was never told of the treaty violation and thus could not preserve its rights sooner; (3) the State fraudulently concealed from defendant his rights under the Vienna Convention; and (4) the reliance on a state procedural rule to bar an action violates international law.

Voidness

Defendant contends that the principle ***restitutio in integrum***, which is well established in international law, renders his conviction and sentence void. ***Restitutio in integrum*** is defined as:

> "In the civil law, restoration or restitution to the previous condition. This was effected by the prætor[3] on equitable grounds, at the prayer of an injured party, by rescinding or annulling a contract or transaction valid by the strict law, or annulling a change in the legal condition produced by an omission, and restoring the parties to their previous situation or legal relations. The restoration of a cause to its first state, on petition of the party who was cast, in order to have a second hearing." Black's Law Dictionary 1313 (6th ed. 1990).

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3. A Roman municipal officer who possessed "extensive equitable jurisdiction." Black's Law Dictionary 1175 (6th ed. 1990).

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Although we acknowledge the important role that *restitutio in integrum* plays in international law, defendant has not cited any authority to support a conclusion that the principle renders defendant's conviction and death sentence void. Instead, both the quotation from Black's, upon which defendant relies, and the other authorities cited by defendant support the conclusion that *restitutio in integrum* is an equitable remedy for violations of a treaty. To say that the proper remedy for a treaty violation is to annul the act that caused the violation is a far cry from concluding that the remedy means that a court's decision is void.

This court has explained that an order is void if it was entered by a court that lacked jurisdiction of the parties or of the subject matter or that lacked the inherent power to make or enter the particular order involved. *R.W. Sawant & Co. v. Allied Programs Corp.*, 111 Ill. 2d 304, 309 (1986). Here, the trial court clearly had jurisdiction of the parties and of the subject matter and it had the inherent power to make or enter the orders involved. Consequently, we see no basis upon which to conclude that defendant's conviction and sentence are void.

The Consul General's Knowledge

The Consul General argues that the trial court erred in denying its motion to intervene in the section 2-1401 petition. It further argues that the limitation period does not apply to bar its claim because it "only recently became aware that the State of Illinois had tried and sentenced its national to death." If we accept, without deciding, that the Consul General can intervene in the section 2-1401 petition

(a proposition that the State vigorously disputes), we must conclude that the action would be time-barred.

Although a petitioner must demonstrate due diligence to obtain relief pursuant to section 2-1401 (*Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986)), a showing of due diligence does not obviate the need to file a section 2-1401 petition within the applicable limitation period. Our case law is clear:

> "[T]he two-year limitation mandated by section 2-1401 and its predecessor, section 72 (Ill. Rev. Stat. 1975, ch. 110, par. 72), must be adhered to in the absence of a clear showing that the person seeking relief is under legal disability or duress or the grounds for relief are fraudulently concealed." *Caballero*, 179 Ill. 2d at 211.

Here, the Consul General does not allege that it was under duress or a legal disability or that the grounds for relief were fraudulently concealed. Consequently, we are unable to conclude that it is entitled to seek relief under section 2-1401 outside the limitation period simply because it did not discover the underlying facts until after the limitation period had expired.

Fraudulent Concealment

Defendant argues that the limitation period was tolled for him because the State fraudulently concealed from him the fact that the Vienna Convention gave him the right to consular assistance. Defendant argues that he has certain rights under the Vienna Convention and that the State had

the duty to inform him of these rights. Defendant concludes that the State's failure to inform him of these rights constitutes fraudulent concealment. We disagree.

To toll the limitation period, the alleged fraud must consist of "affirmative acts or representations designed to prevent discovery of the cause of action or ground for relief." *Crowell v. Bilandic*, 81 Ill. 2d 422, 428 (1980). Here, the fact that defendant was entitled to be informed of his rights under the Vienna Convention is a matter of international law. The rights that defendant asserts the State was obliged to inform him of are rights that are, by defendant's own admission, contained in treaties that are public documents not only in this state, but also in countless countries around the world.

Even if we accept defendant's contention that the State was obligated to inform defendant of these rights, we are unable to conclude that this failure can constitute fraud when the rights are a matter of public record. Consequently, we are unable to conclude that, by failing to inform defendant of his rights, the State fraudulently concealed defendant's grounds for relief.

State Procedural Rule

Defendant also contends that the limitation period must be tolled because a state procedural rule cannot prevent defendant from seeking a remedy for a violation of international law. Defendant acknowledges that the Supreme Court has held that, to determine whether a state's procedural rules govern, a court must look to the treaty's text and

drafting history. See *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700, 100 L. Ed. 2d 722, 731, 108 S. Ct. 2104, 2108 (1988); see also *Breard v. Greene*, 523 U.S. 371, 375, 140 L. Ed. 2d 529, 537, 118 S. Ct. 1352, 1354 (1998) (holding that, "absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State").

Here, the Vienna Convention provides that the rights expressed in the Convention "shall be exercised in conformity with the laws and regulations of the receiving State subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." 21 U.S.T. at 101; see also *Breard*, 523 U.S. at 375, 140 L. Ed. 2d at 537, 118 S. Ct. at 1355 (reaching a similar conclusion).

Defendant provides no explanation as to how section 2-1401's limitation period prevents "full effect" from being given to the purposes of the Vienna Convention. Defendant had ample opportunity to raise his claim and have it considered on the merits during his trial, on direct appeal, and during the two years following the entry of judgment. We do not believe that a reasonable limitation period designed to preserve the public's interest in the finality of judgments can be construed as a rule that frustrates the purposes of the Vienna Convention. Because the treaty specifically states that the forum court's rules and regulations will govern, we have no basis to conclude that the reasonable limitation period violates international law.

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Mandamus Proceeding

In the *mandamus* proceeding, defendant and the Consul General argue that *mandamus* relief is appropriate because (1) defendant's conviction and sentence are void; and (2) they raise issues of great public importance and of great importance to the administration of justice.

We have already rejected the argument relating to voidness and need not consider it further.

Mandamus is an extraordinary remedy to compel a public officer to perform a nondiscretionary act. *Lewis E. v. Spagnolo*, 186 Ill. 2d 198, 229 (1999). This court will not issue a writ of mandamus absent a showing of "a clear, affirmative right to relief, a clear duty of the [public officer] to act, and clear authority in the [public officer] to comply with the writ." *Spagnolo*, 186 Ill. 2d at 229.

Although this action may involve issues of "great public importance and of great importance to the administration of justice," that, in and of itself, is not a reason to grant *mandamus* relief. Here, defendant and the Consul General have not demonstrated that they have a clear, affirmative right to relief. Absent such a showing, we will not issue a writ.

CONCLUSION

We affirm the judgment of the circuit court of Cook County. The clerk of this court is directed to enter an order setting Wednesday, November 22, 2000, as the date on which

the sentence of death entered by the circuit court shall be implemented. Defendant shall be executed in the manner provided by law (725 ILCS 5/119-5 (West 1998)). A certified copy of the mandate of this court shall be transmitted by the clerk of this court to the Director of Corrections, to the warden of Tamms Correctional Center, and to the warden of the institution where defendant is confined.

Affirmed.

JUSTICE BILANDIC, specially concurring:

I agree that defendant's claim is procedurally barred and that the judgment of conviction is not void. I therefore join the majority opinion. I write separately, however, to address an issue that was raised during oral argument — the repatriation of defendant to the Republic of Poland.

Defendant was born in Poland. However, as the circuit court observed, defendant has lived in this country for all but the first 18 months of his life. Defendant has attended school here, has earned a living here, and has even served in the United States army. Defendant has committed numerous other crimes for which he was imprisoned in the United States. In short, defendant's life history reflects that he would be a stranger in Poland — without immediate family, friends, and social roots.

A significant interest of the Polish government in this case is to spare defendant from the death penalty. At the time of defendant's arrest in 1981 for the rape and murder of Barbara Doyle, Poland employed the death penalty. Poland

abolished its death penalty, effective January 1, 1998. Amnesty International Report, *The Death Penalty Worldwide: Developments in 1997*, ACT 50/04/98, April 1998, at 5-6.

Defendant has received nearly 20 years of due process from the Illinois courts. We have treated defendant in precisely the same manner as we would treat a United States citizen, and we have given defendant every constitutional right and protection that we would give a United States citizen. Nevertheless, I note that, although such a decision is not within the province of this court, I would favor the repatriation of defendant, a convicted murderer and rapist, to Poland. The Polish government, however, has never requested the return of defendant to Poland. It is up to the Polish government to initiate discussions in this regard with the appropriate authorities of the United States government.

JUSTICE McMORROW, concurring in part and dissenting in part:

Like Justice Heiple, I believe that the State's admitted violation of the Vienna Convention on Consular Relations is a serious matter which requires remedy by this court. However, unlike Justice Heiple, I believe that the remedy in this case should be to vacate defendant's death sentence but not his convictions. I therefore concur in the majority's affirmance of defendant's convictions but dissent from the majority's affirmance of defendant's death sentence.

Article 36(1)(b) of the Vienna Convention on Consular Relations provides that

> "if the accused so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.*" (Emphasis added.) Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

The Vienna Convention makes no distinction between resident foreign aliens and recently arrived or visiting foreign nationals. The language of the treaty "is mandatory and unequivocal, evidencing the signatories' recognition of the importance of consular access for persons detained by a foreign government." *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring). Further, "[t]he provisions of the Vienna Convention have the dignity of an act of Congress and are binding upon the states. *See Head Money Cases*, 112 U.S. 580, 598-99, 5 S. Ct. 247, 253-54, 28 L. Ed. 798 (1884). The Supremacy Clause mandates that rights conferred by a treaty be honored by the states." *Breard*, 134 F.3d at 622 (Butzner, J., concurring). In the case at bar, there is no question that the State failed to inform defendant, a citizen of Poland, of his right, under article 36(1)(b) of the Vienna Convention, to contact the Polish consulate at the time of his arrest.

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Nor is there any issue that the State's failure to inform defendant of his right to consular notification is a serious violation of international law, particularly since a sentence of death was imposed. The Inter-American Court of Human Rights[4] has recently held that "failure to observe a detained foreign national's right to information, recognized in Article 36(1)(b) of the Vienna Convention on Consular Relations, is prejudicial to the due process of law and, in such circumstances, imposition of the death penalty is a violation of the right not to be deprived of life 'arbitrarily', as stipulated in the relevant provisions of the human rights treaties (*v.g.* American Convention on Human Rights, Article 4; International Covenant on Civil and Political Rights, Article 6), with the juridical consequences that a violation of this nature carries, in other words, those pertaining to *the State's international responsibility and the duty to make reparation.*" (Emphasis added.) *The Right to Information about Consular Assistance Within the Framework of the Guarantees of Due Process of Law*, Advisory Opinion OC-16/99 of the Inter-American Court of Human Rights, par. 141.7, October 1, 1999. This holding mirrors this court's own recognition that death penalty cases require "a high

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4. The Inter-American Court was established under the authority of the American Convention on Human Rights, a treaty which entered into force in 1978. Located in Costa Rica, the Court has seven judges, elected for renewable six-year terms by the 24 states parties to the American Convention. See generally T. Buergenthal, *The Inter-American Court of Human Rights*, 76 Am. J. Int'l L. 231 (1982); T. Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 Am. J. Int'l L. 1 (1985). The State Department of the United States actively participated before the Inter-American Court in briefing and oral argument in the proceedings on Advisory Opinion OC-16/99.

standard of procedural accuracy." *People v. Walker*, 91 Ill. 2d 502, 517 (1982).

Further, a violation of the consular notification provisions of the Vienna Convention affects both the rights of the detainee and the interests of the foreign state, in this case, the Republic of Poland. Unquestionably, Poland has a strong state interest in this case. Poland does not have a death penalty. It, therefore, is justifiably interested in aiding and assisting those of its citizens who are subject to the possible imposition of that penalty while abroad. Indeed, as the Consul General for the Republic of Poland in Chicago has frankly acknowledged to this court, it is solely because the Republic of Poland is officially opposed to the death penalty that the Polish government has intervened on behalf of defendant in this case. According to the Consul General, Poland has no intention of adopting a policy of intervention in non-death-penalty cases.

Moreover, Poland is not alone in its concern regarding violations of the right to consular notification in death penalty cases. In the case at bar, *amici* the Federal Republic of Germany and the United Mexican States, both signatories to the Vienna Convention, have taken the position that the violation of the consular notification provisions in the instant case must be remedied because of the severity and finality of the death sentence. Before the Inter-American Court, numerous countries, including Mexico, El Salvador, Guatemala, the Dominican Republic, Honduras, Paraguay and Costa Rica supported the principle of judicial enforcement of the Vienna Convention in death penalty cases. See *The Right to Information about Consular Assistance Within the Framework of the Guarantees of*

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Due Process of Law, Advisory Opinion OC-16/99 of the Inter-American Court of Human Rights, October 1, 1999.

I am fully aware of the procedural obstacles which confront defendant's claim in the case at bar. But this is an extraordinary case. More is at stake here than the rights of a single defendant. "The protections afforded by the Vienna Convention go far beyond [defendant's] case. United States citizens are scattered about the world — as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that 'international law is founded upon mutuality and reciprocity. . . .' *Hilton v. Guyot*, 159 U.S. 113, 228, 16 S. Ct. 139, 168, 40 L. Ed. 95 (1895). * * * The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation." *Breard*, 134 F.3d at 622 (Butzner, J., concurring). As Justice Heiple correctly observes, we cannot expect that the citizens of this country, while abroad, will be afforded their rights under the Vienna Convention, or indeed, under any treaty, if we do not afford those same international rights to foreign nationals here in the United States. Through no fault of its own, the Polish government is only now able to assist its citizen in his death penalty defense. It is in our own self-interest to uphold the principle of international comity, acknowledge the notification violation that occurred in the case at bar, and provide a remedy.

Accordingly, because defendant's right to consular notification under the Vienna Convention was, in fact,

violated in this case; because that violation is an extremely serious matter under international law; because the sovereign state of Poland has a strong and legitimate interest in aiding and assisting its citizens who are subject to death penalty proceedings; and because it is in the self-interest of the citizens of this state to uphold the rights provided by the Vienna Convention and remedy the error that occurred in this case; I would exercise this court's equitable powers and vacate defendant's death sentence and remand for a new sentencing hearing. I would further hold that, at the remand sentencing hearing, the State may again pursue the death penalty while the Consul General may assist defendant in his defense.

I believe that the unique and compelling circumstances of this case require a remedy for the State's violation of the Vienna Convention. I express no opinion, however, on what effect a violation of the right to consular notification would have outside the context of the death penalty or the facts of this case.

CHIEF JUSTICE HARRISON, dissenting:

I join in Justice Heiple's dissent. I write separately simply to express my view that regardless of the outcome on retrial, defendant cannot be sentenced to death. For the reasons set forth in my partial concurrence and partial dissent in *People v. Bull*, 185 Ill. 2d 179 (1998), the Illinois death penalty law violates the eighth and fourteenth amendments to the United States Constitution (U.S. Const., amends. VIII, XIV) and article I, section 2, of the Illinois Constitution (Ill. Const. 1970, art. I, §2). It is therefore void and unenforceable.

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JUSTICE HEIPLE, also dissenting:

Defendant, a Polish citizen residing in the United States as a permanent resident alien, was, along with other offenses, tried and convicted of murder and sentenced to death. This court affirmed defendant's convictions and sentence on direct appeal. Subsequently, defendant filed a section 2-1401 petition for relief from judgment and a petition for a writ of *mandamus* based upon an alleged violation of his rights under the Vienna Convention on Consular Relations (Vienna Convention). Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

The Vienna Convention is a binding international treaty to which the United States and the Republic of Poland are parties. Article 36 of the Vienna Convention required the State to inform defendant of his right to contact a Polish consular official at the time of his arrest. This was not done. Upon belatedly learning of the defendant's situation, however, the Polish government has now intervened on defendant's behalf.

Although there is no dispute that the State violated the Vienna Convention by failing to provide defendant the required consular notification, the majority declines to provide defendant any relief for this violation. Because this case raises important issues of international relations and the rights of all persons, domestic and foreign, I respectfully dissent.

The State suggests that a letter of apology to the Polish government would rectify this oversight. Whether this

apology would be sent before or after defendant's execution was not specified.

What is cavalierly dismissed here is that the consular notification requirement is meant to ensure that foreign nationals imprisoned abroad have adequate legal representation and that they should be tried in accordance with principles of justice generally recognized in the international community by allowing consular officials to consult with the defendant and with attorneys, court officials and prosecutors. It is important to note that this protection is designed for Americans abroad as well as for foreign nationals in the United States. In the instant case, however, the Polish Consul General was not even aware of defendant's situation until 1998, some 16 years after his conviction and sentence.

The question arises, how can we expect protection under this treaty for American citizens abroad if we do not extend equal protection to foreign nationals residing in the United States? The answer is, we cannot. The decision reached in this case thus has implications reaching far beyond the execution of this defendant.

For the breach of this international convention, defendant's convictions and sentence should be reversed and the cause remanded for a new trial in compliance with the solemn treaty obligations of the United States, which, under our constitution, are the supreme law of the land.

For the reasons given, I respectfully dissent.

CHIEF JUSTICE HARRISON joins in this dissent.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, CRIMINAL DIVISION DATED AND FILED MAY 3, 1999

IN THE CIRCUIT COURT OF COOK
COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

No. 81-C-6407
Hon. Thomas R. Fitzgerald

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Respondent,

vs.

GREGORY MADEJ,

Defendant-Petitioner.

No. 98 CH 10183
Hon. Thomas R. Fitzgerald
(Transferred from Chancery)

GREGORY MADEJ,

Plaintiff, and

RYSZARD SARKOWICZ,

Intervening Plaintiff,

vs.

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JERRY GILMORE, Warden, Pontiac Correctional Center, DONALD P. O'CONNELL, Chief Judge of the Circuit Court of Cook County, and THE CIRCUIT COURT OF COOK COUNTY,

Defendants.

MEMORANDUM OPINION AND ORDER

Petitioner, Gregory Madej, pursuant to the provisions of 735 ILCS 5/2-1401, seeks post-judgment relief from his death sentence and convictions for murder, felony-murder, armed robbery, rape, and deviate sexual assault. In the alternative, Petitioner seeks relief from the aforementioned convictions and sentences, claiming they are void orders entered in violation of international law. As grounds for relief, Petitioner, a Polish national, asserts that his convictions and death sentence were secured in derogation of his rights under the Vienna Convention of 1963 and the Consular Convention of 1972, when police failed to inform petitioner of his right to contact a consular official and failed to notify the Polish Consulate of his arrest and detention.

In addition, Mr. Madej is joined by the Consul General of the Republic of Poland, Mr. Ryszard Sarkowicz, in seeking vacatur of the abovementioned convictions and death sentence, via a writ of mandamus filed in the Chancery Division of the Circuit Court of Cook County, pursuant to 735 ILCS 5/14-101. The Chancery case, which is almost identical to the Criminal case as to cause of action and relief sought, has been transferred to the Criminal Division and will be consolidated in this Court's opinion.

Appendix B

I. BACKGROUND[1]

A. Case Facts and Procedural History

Barbara Doyle's naked body was found in an alley on the north side of Chicago in the early morning hours of August 23, 1981. She had been stabbed and slashed approximately 34 times. Semen was found in her vagina and rectum. Petitioner eventually admitted that he was with Barbara Doyle, and witnesses testified to seeing an intoxicated and "high" Madej in the company of Doyle before her death. Madej admitted that he had consumed at least two cases of beer, drank some whiskey, smoked marijuana, ingested 10 quaaludes, and injected Talwin at that time. At 5:00 a.m. on the day of the murder, police attempted to pull Madej over for driving through a stop sign. Instead of stopping, Madej lead the officers on a high-speed chase. When he was finally apprehended, his hands, head, shirt, pants, and undershorts were covered with blood. The car, which belonged to the victim, was stained with blood. A large knife, as well as the victim's blood-soaked jeans and blouse, were found inside the car. Petitioner claimed that he and the victim had consensual sex, and that he stabbed her in self-defense during a struggle after she tried to steal some drugs from him.

After a bench trial, Petitioner was convicted of the murder, felony murder, rape, deviate sexual assault, and armed robbery of Barbara Doyle. Petitioner was sentenced to death on August 18, 1982. On direct appeal, Petitioner

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1. A more exhaustive review of the facts is contained in *People v. Madej*, 177 Ill. 2d 116 (1997).

alleged *inter alia* that he received ineffective assistance of counsel based on his counsel's failure to present sufficient mitigating evidence at sentencing. The Illinois Supreme Court affirmed Petitioner's convictions and death sentence. *People v. Madej*, 106 Ill. 2d 201 (1985). The United States Supreme Court subsequently denied Mr. Madej's petition for writ of certiorari. *Madej v. Illinois*, 474 U.S. 935 (1985), *reh'g denied*, 474 U.S. 1038 (1985).

In 1986, Petitioner filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act. His attorney filed an amended post-conviction petition in 1993. The circuit court dismissed the amended petition without an evidentiary hearing. The Illinois Supreme Court subsequently affirmed the order of the circuit court. *People v. Madej*, 177 Ill. 2d 116 (1997), *reh'g denied*, Sept. 29, 1997. In a comprehensive opinion, the Illinois Supreme Court addressed in detail the following claims made by Petitioner[2]:

- Ineffective assistance of counsel during sentencing for failure to present evidence, failure to inform defendant of the nonunanimity rule, and error in stipulating to death eligibility.

- Ineffective assistance of counsel at trial for failure to advise defendant of right not to

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2. This court takes note of the fact that no Vienna Convention claim is made in the postconviction petition even though one of the attorneys who represented Mr. Madej in that past proceeding, Mr. Amarjeet Bhachu, is one of the attorneys currently representing Mr. Madej in the instant proceeding.

testify, failure to corroborate diminished capacity defense, failure to obtain a timely ruling on motion to suppress, failure to introduce 911 tape recording, and cumulative error.

- Ineffective assistance of counsel on appeal for not arguing the State's failure to preserve exculpatory/mitigating evidence, the trial court's consideration of matters *de hors* the record, a misstatement of the evidence, and errors during sentencing.

The Illinois Supreme Court acknowledged that the failure of Mr. Madej's attorney to conduct an investigation into potential sources of mitigation at sentencing was conduct that fell below the minimum level of competent representation. *See Madej*, 177 Ill. 2d at 136-37. However, the Court determined that although the attorney's performance was deficient in this regard, it was not ineffective assistance since Mr. Madej was not prejudiced as a result of this deficiency. *See id.* After a thorough review, the Court ultimately held that all of Petitioner's claims of ineffective assistance of counsel were without merit.

Subsequently, a petition for writ of certiorari, seeking review of the Illinois Supreme Court's denial of post-conviction relief, was filed and denied by the United States Supreme Court on April 27, 1998. *Madej v. Illinois*, 118 S. Ct. 1565, 1998 U.S. LEXIS 2892 (1998). Petitioner thereafter sought discretionary review of his Vienna Convention and Consular Convention claims by the Illinois

Supreme Court on May 27, 1998, by filing a motion for leave to file a petition for an original writ of mandamus in the Illinois Supreme Court. The Republic of Poland filed a formal diplomatic note with the United States State Department on June 10, 1998, expressing grave concern over the Vienna Convention transgression. The Illinois Supreme Court denied Petitioner's motion for leave to file a petition for an original writ of mandamus on June 17, 1998, under docket number 85534.[3]

Currently pending is Mr. Madej's petition for writ of habeas corpus in the United States District Court for the Northern District of Illinois. Most recently, Mr. Madej's motion for discovery to support his petition for writ of habeas corpus was denied, except for discovery on the 911 tape and on certain tissue and semen samples was granted. *United States ex rel. Gregory Madej v. Gilmore*, 1999 U.S. Dist. LEXIS 4086 (Mar. 23, 1999).

B. The Vienna Convention and Consular Convention

The Vienna Convention on Consular Relations is a multinational treaty which was adopted by the United Nations in 1963 and ratified by the United States in 1969. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T 77 [hereinafter Vienna Convention]. The Vienna Convention guarantees consular officials of each nation that has adopted it access to their nationals who may need assistance when traveling, working, or living abroad. In particular, the arresting government is required to notify a foreign national

3. The denial of the motion will have no bearing on this case.

who has been arrested or detained of his right to contact his/her consul so that the foreign national may communicate with, and be visited by, consular officials. At minimum, it provides a cultural bridge for detained nationals who must otherwise navigate through an unfamiliar and often hostile legal system. William J. Aceves, *Murphy v. Netherland*, 92 A.J.I.L. 87, 89 (January 1998). It also enables governments to monitor the safety and fair treatment of their nationals abroad, to reassure relatives and friends at home, to promote respect for human rights, and to avoid disruptions in foreign relations that could result from the mistreatment of detained persons. *Id.*

Today well over 100 nations have accepted the Vienna Convention, which depends for its effectiveness on the reciprocal obligations it imposes on all signatories, without regard to their political systems or legal processes. By express command of the United States Constitution, it is the duty of the judges of every state to uphold and enforce treaties entered into by the United States. *Dominguez v. State*, 90 Tex Crim 92 (1921). *See also United States v. Minnesota*, 270 U.S. 181 (1926). Therefore all courts, state and national, must take judicial notice of and be governed by a treaty of the United States. *United States v. Rauscher*, 119 U.S. 407, 418 (1886). However, the use of a State's violation of the Vienna Convention as a cause of action or a defense in federal habeas proceedings is relatively new and first gained national and international attention when the State of Virginia prepared to execute Angel Breard, a Paraguayan national, who filed a federal habeas corpus petition claiming his conviction and sentence should be overturned because of a Vienna Convention violation. *See Breard v. Greene*, 523 U.S.

371, 1998 U.S. LEXIS 2465 (1998) (per curiam). *See also Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998); *Republic of Paraguay v. Allen*, 134 F.3d 622 (4th Cir. 1998). The use of state proceedings for Vienna Convention violations is even more recent than the use of federal habeas proceedings since, until recently, the treaty violations were not discovered until the cases had progressed into federal court. To date, the United States Supreme Court has denied certiorari to both death penalty cases in which a foreign national defendant claimed a violation of his Vienna Convention rights. *See Faulder v. Texas*, 119 S. Ct. 909 (1999) (Joseph Stanley Faulder is a Canadian national on death row in Texas.) and *Breard v. Greene*, 523 U.S. 371, 1998 U.S. LEXIS 2465 (1998).

The Consular Convention of 1972 between Poland and the United States is a more specific agreement which supplements the Vienna Convention and covers matters, such as particular privileges and immunities, which may not have been outlined in the Vienna Convention, and/or which may be unique to the United States's diplomatic relationship with Poland. Consular Convention, May 31, 1972, U.S.-Pol., 24 U.S.T. 1231.

C. Consolidation of Criminal and Civil Proceedings

In order to ensure exhaustion of state remedies, Petitioner concurrently filed 1) a petition for post-judgment relief pursuant to 735 ILCS 5/2-1401 in the Criminal Division of the Circuit Court of Cook County, and 2) a petition for a writ of mandamus pursuant to 735 ILCS 5/14-101 in the Chancery Division of the Circuit Court of Cook County. The

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Chancery case has been transferred to this court for consolidation since Mr. Madej raises the same issues and seeks the same relief in both petitions. This court has consolidated the two cases in the interests of judicial economy and the efficient disposition of this litigation. *See infra* Part II.B.

II. ANALYSIS

As discussed below, Petitioner is barred from raising his Vienna Convention and Consular Convention claims because his petition is late. Even if his petition was timely, his claims would not succeed because he has failed to show that the denial of consular notification prejudiced the outcome of his trial.

A. Statute of Limitations

Pursuant to 735 ILCS 5/2-1401, a petition for post-judgment relief must be filed no later than two (2) years after the entry of the order or judgment unless the person seeking relief was under legal disability or duress or the ground for relief was fraudulently concealed. 735 ILCS 5/2-1401 © (West 1998). Courts have strictly construed this provision of the statute in furtherance of the policy favoring finality of judgments. *Bank of Ravenswood v. Dominos*, 269 Ill. App. 3d 714, 724 (1st Dist. 1995). Even for violations of international treaties, the procedural rules of the forum State govern the implementation of the treaty in that State. *See Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1998); *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988). Petitioner has filed his § 2-1401 petition on or

about July 31, 1998, 16 years after a judgment was entered against him in 1982. By not asserting his Vienna Convention and Consular Convention claims in a timely manner, Mr. Madej has failed to exercise his rights under both treaties in conformity with the laws of the United States and the State of Illinois. He is therefore barred from raising his Vienna Convention and Consular Convention claims because his petition is late.

Petitioner, who is a Polish national, argues that his late filing should be excused because the State "fraudulently concealed" his rights to assistance from the Polish Consulate under both Conventions. In order to overcome the limitations period by showing fraudulent concealment, the petitioner must demonstrate "affirmative acts designed to prevent discovery of a cause of action or ground of relief." *Bank of Ravenswood*, 269 Ill. App. 3d at 724. *See also Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 226-28 (1986). Silence alone does not constitute fraudulent concealment. *Id.* In this case, Petitioner has not stated or shown how the police or the State took affirmative action to prevent Petitioner from learning about and exercising his rights under the Vienna Convention and Consular Convention. Instead, Petitioner's claim focuses on the State's silence or failure to advise Petitioner, which does not amount to fraudulent concealment under the law. Furthermore, there was nothing preventing Petitioner, or any of the attorneys who have represented him since 1982, from learning of the provisions of both Conventions and raising such a claim in a timely manner.

Petitioner has also argued in the alternative that because his convictions and death sentence were obtained in

contravention of international law, they are void. As a result, Petitioner claims the two-year time limitation of § 2-1401 does not apply to his claims. However, the State is correct in pointing out that Petitioner has failed to cite one case supporting the proposition that a defendant's conviction or sentence is void if the Vienna Convention was not followed in his or her case. On the contrary, the country's highest court, in addressing a procedurally defaulted claim of a Vienna Convention violation in *Breard v. Greene*, stated that even if the claim had been properly raised and proven, "it is extremely doubtful that the violation should overturn a final judgment of conviction without some showing that the violation had an effect on the trial." 523 U.S. at __, 1998 U.S. LEXIS 2465, at *9[4]. The High Court's statement about

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4. Mr. Madej has argued that because the United States Supreme Court's per curiam decision in *Breard* accompanies a denial of certiorari, it has no precedential value. (Report of Proceedings of November 9, 1998 hearing at 20). Although the High Court has noted that "opinions accompanying the denial of certiorari cannot have the same effect as decisions on the merits," (*Teague v. Lane*, 489 U.S. 288, 296 (1989)), the *Breard* Court did not merely deny certiorari. It is common for per curiam rulings to be used for orders in original jurisdiction cases. *See* Steven C. Sparling, Note, *Cutting the Gordian Knot: Resolution of the Sentencing Dispute Over Dismissed Charges After United States v. Watts*, 6 Geo. Mason Law Rev. 1073, 1092 n. 177 (1998). Moreover, as a basic tool of Supreme Court jurisprudence, per curiam opinions are not intended to be ignored or relegated to insignificance. *Id.* at 1093. Furthermore, many cases, both in federal and state court, have relied on *Breard* in their opinions. *See, e.g., United States v. Oropeza-Flores*, 1999 U.S. App. LEXIS 5991, No. 98-50305 (9th Cir. 1999); *United States v. Lombera-Camorlinga*, 1999 U.S. App. LEXIS 5053,

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showing an "effect on the trial" is consistent with the decisions of a number of federal circuits, which have required the defendant to establish prejudice from an alleged Vienna Convention violation. *See United States v. Oropeza-Flores*, 1999 U.S. App. LEXIS 5991, No. 98-50305 (9th Cir. 1999); *United States v. Lombera-Camorlinga*, 1999 U.S. App. LEXIS 5053, No. 98-50347 (9th Cir. 1999); *United States v. Fredi Ademaj*, 170 F.3d 58 (1st Cir. 1999); *United States v. Salas*, 1998 U.S. App. LEXIS 32633, No. 98-4374 (4th Cir. 1998); *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997); *Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996). *See also United States v. Rangel-Gonzales*, 617 F.2d 529 (9th Cir. 1980); *United States v. Calderon-Medina*, 591 F.2d 529 (9th Cir. 1979) (Prejudice analysis employed in both cases when I.N.S. failed to advise defendants of their right to contact their consulates as required by I.N.S. regulations.) Accordingly, this court does not consider Petitioner's convictions and sentence to be automatically void as a result of a Vienna Convention violation. Thus, the two-year statute of limitations applies to bar the instant proceeding.

B. Petition for Writ of Mandamus

Madej's challenge to his criminal convictions and sentence were properly made in this forum via a § 2-1401 petition. A mandamus action, such as the Petitioner filed concurrently in Chancery, may not be used as a substitute

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No. 98-50347 (9th Cir. 1999); *United States v. Fredi Ademaj*, 170 F.3d 58 (1st Cir. 1999); *Villafuerte v. Stewart*, 142 F. 3d 1124, 1125 (9th Cir. 1998); *Consulate General of Mexico v. Phillips*, 17 F. Supp. 2d 1318 (So. Dist. Fla. 1998); *Kasi v. Virginia*, 256 Va. 407 (1998).

for seeking traditional post-judgment relief in a criminal case when the issues and relief sought are precisely the same. Therefore, the mandamus action must fail on procedural grounds. Even if the mandamus action were to survive procedural attack, it would not succeed for the reasons discussed *infra* in Part II. D.

C. Intervening Petitioner

After Mr. Madej filed his petitions in the Criminal Division and Chancery Division, the Consul General of the Republic of Poland (Consul General) requested leave to intervene as a party in both matters. Decisions from several federal circuits appear to stand for the proposition that a foreign national's country has standing to seek redress for the violation of a treaty because treaties are designed to protect the sovereign interests of nations. *See Paraguay v. Allen*, 134 F.3d 622, 626 (4th Cir. 1997); *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990); *United States v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986). However, the State countered that the Consul General should not be allowed to intervene as a party because there is no specific judicial remedy available to a foreign sovereign who seeks vacatur of a criminal conviction and death sentence for a Vienna Convention violation. This court agrees with the State and is persuaded by the United States Supreme Court's comment on Paraguay's standing in *Breard*. Specifically, the *Breard* Court stated that neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States' courts to set aside a criminal conviction and sentence for a violation of consular notification provisions. *Breard*, 523 U.S. at __, 1998 U.S.

LEXIS 2465, at *10. Consequently, this court holds that the Consul General does not have standing to set aside Mr. Madej's convictions and sentence. However, inasmuch as the Chancery Division allowed the Consul General to intervene, his petition will be taken into consideration in the context of this opinion.

D. Petitioner's Claims of Vienna Convention and Consular Convention Violations

Petitioner argues that his rights to a fair trial were violated because the police never told him he could contact the Polish Consulate, nor did police inform the Polish Consulate of his arrest and detention. Petitioner contends the State had an affirmative duty to inform him of his rights to consular assistance and to notify the Polish Consulate under Article 36 of the Vienna Convention. 21 U.S.T. 77. Petitioner also claims the State had a duty to notify the Polish Consulate under Article 29 of the Consular Convention. 24 U.S.T. 1231. Because this court deems the Petitioner was not entitled to automatic notification of his consulate pursuant to the Consular Convention, that issue will be addressed first.

Article 29(2) of the Consular Convention states, in pertinent part:

> The appropriate authorities of the receiving State shall immediately inform a consular official of the sending State of the detention or arrest of any national of the sending State who has not been admitted to permanent residence in the receiving

> State. In the case of the detention or arrest of a national . . . *who has been admitted to permanent residence* in the receiving State, the appropriate authorities of the receiving State, *on the request of such national*, shall immediately inform a consular officer of the sending State of such detention or arrest. (emphasis added)

24 U.S.T. 1231.

Automatic notification of a foreign national's consulate under Article 29 depends on the visa/residency status of the foreign national. If the foreign national is a permanent resident, consul notification is *not* automatic, but is triggered by the foreign national's request. In the instant case, Petitioner is a *permanent resident* Polish national who immigrated to the United States with his mother in 1961 when he was 1-½ years old. *See* Report to the Court by Jill Miller, M.S.S.W., June 7, 1991 (Pet.'s Ex. 6). There is no indication from the petition and attached affidavits that he ever requested the Polish Consulate be notified of his arrest and detention. Therefore, there was no violation of Article 29 of the Consular Convention.

However, as to the Vienna Convention, the Court finds that the State did violate Article 36 by failing to advise Petitioner of his right to speak to the Polish Consulate.

Article 36 of the Vienna Convention states in pertinent part:

> (a) Consular officers shall be free to communicate with nationals of the sending State and to have

> access to them. Nationals of the Sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that state is arrested . . . or is detained in any other manner . . . *The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.* (emphasis added)

21 U.S.T. 77.

In this regard, the State's violation resulted from the failure to inform Mr. Madej of his rights under the Vienna Convention.[5]

Whether a State's Vienna Convention violation can overturn a defendant's conviction and sentence in a state proceeding is a matter of first impression in this court. Since the use of a Vienna Convention violation as a cause of action has been analyzed in various types of federal proceedings, this court looks to the federal courts for guidance and is persuaded by the sound, three-step analysis used in *United*

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5. This court takes note of the fact that had Mr. Madej been informed of his rights, it is nevertheless speculative that he would have requested his consulate to be notified of his detention, as discussed in Part II.D.3.

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States of America v. Esparza-Ponce, 7 F. Supp. 2d 1084 (S.D. Cal. 1998), specifically to determine whether a Vienna Convention violation is analogous to a Miranda violation. First, the court must determine whether the defendant has standing to challenge a violation of the Convention. Id. at 1095. Second, assuming the court answers that question in the affirmative, the court must decide whether defendant must show prejudice. *Id.* at 1096. Third, if he must show prejudice, the court must decide whether he has done so. *Id.* at 1097. The *Esparza-Ponce* court's requirement of a showing of prejudice is consistent with the decisions of other federal circuits, as well as the United States Supreme Court's *Breard* opinion.

Petitioner has given various reasons why this court should deviate from the prejudice analysis established by federal courts and should instead *presume* prejudice from a denial of consular notification by analogy to cases where states deny or interfere with counsel and by analogy to cases where conflicts affect attorney performance. However, there is no legal precedent for what Petitioner wants. To the contrary, the United States Supreme Court recently denied certiorari in *Faulder v. Texas*, 119 S. Ct. 909 (1999), in which a Canadian national filed a habeas petition, asserting a Vienna Convention violation. The Fifth Circuit originally denied habeas relief to Joseph Stanley Faulder because the evidence that would have been obtained by the Canadian government is the same as or cumulative of evidence defense counsel had or could have obtained. *See Faulder v. Johnson*, 81 F. 3d 515, 520 (5th Cir. 1996). The United States Supreme Court had the opportunity to review the *Faulder* case and use it to alter, revise, or clarify its decision in *Breard*. Instead,

the High Court denied certiorari. Furthermore, as recently as last month, the Court of Appeals for the Ninth Circuit rejected the argument that prejudice should be presumed when a foreign national's Vienna Convention rights have been violated. *See United States v. Lombera-Camorlinga*, 1999 U.S. App. LEXIS 5053, at *9-10, No. 98-50347 (9th Cir. Mar. 25, 1999).

Petitioner has also proposed that the court should apply international law to void Petitioner's convictions and sentence. However, the fact remains that no other case in the United States dealing with a Vienna Convention Article 36 violation has used international law in its analysis.

For these reasons, this court will proceed within the framework established by the federal circuits in dealing with Vienna Convention violations and require Petitioner to make a showing of prejudice before he can secure a remedy.

1. *Petitioner has arguably established standing to challenge a violation of the Vienna Convention, but this court holds that a violation of Petitioner's Vienna Convention rights will not be treated the same as a violation of Fifth and Sixth Amendment rights.*

A threshold question in assessing claims of an alleged violation of treaty rights under the Vienna Convention is whether the individual seeking redress has standing to assert the alleged violation. Treaties are contracts between sovereigns. *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). Thus, only the signatory nations generally have standing to enforce a treaty. *See United States v. Rosenthal*, 793 F.3d 1214, 1232 (11th Cir. 1986). An exception exists, however,

if a treaty confers rights on individuals. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989). The question thus becomes whether the Convention confers individual rights.

The *Breard* Court opted not to discuss Angel Breard's standing, holding instead that Breard had procedurally defaulted his claim by not raising the issue in state court. *Breard*, 523 U.S. at __, 1998 U.S. LEXIS 2465, at *6-7. But in dictum, the *Breard* Court stated that the Convention arguably confers on an individual the right to consular assistance following arrest. *Id.* at *7. To date, at least one federal court has held that the Vienna Convention does not create constitutional rights. *See Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997). According to the *Murphy* court, although states may have an obligation under the Supremacy Clause to comply with the provisions of the Vienna Convention, the Supremacy Clause does not convert violations of treaty provisions (regardless of whether those provisions can be said to create individual rights) into violations of constitutional rights. *Id.* Despite the uncertainty in this area, a number of courts have allowed individual claims of Vienna Convention violations to proceed in various contexts from habeas proceedings to motions to suppress. *See, e.g., Breard v. Greene*, 523 U.S. 371 (1998) (per curiam); *United States v. Lombera-Camorlinga*, 1999 U.S. App. LEXIS 5053, No. 98-50347 (9th Cir. Mar. 25, 1999); *United States v. Salas*, 1998 U.S. App. LEXIS 32633, No. 98-4374, (4th Cir. Dec. 31, 1998); *Villafuerte v. Stewart*, 142 F.3d 1124 (9th Cir. 1998); *Faulder v. Johnson*, 81 F.3d. 515, 520 (5th Cir. 1996); *United States v. Chaparro-Alcantara*, 1999 U.S. Dist. LEXIS 2640, No. 98-30070

(C.D. Ill. Mar. 4, 1999); *Mami v. Van Zandt*, 1989 U.S. Dist. LEXIS 5002, No. 89-Civ-0554 (TPG) (S.D.N.Y. May 9, 1989).

In this case, the treaty language states that the rights enumerated in Article 36 belong to the foreign national: "The said authorities shall inform the person concerned without delay of *his rights* under this subparagraph." Vienna Convention, art. 36(1)(b), 21 U.S.T. 77. Based on this and in keeping with the trend in federal courts, this court feels that Petitioner arguably has standing to challenge a Convention violation because he has demonstrated the State violated his rights. However, while this court recognizes that compliance with treaty obligations is clearly required by the Constitution, this court declines to equate rights under Article 36 of the Vienna Convention with fundamental rights such as the Fifth Amendment right against self-incrimination or the Sixth Amendment right to counsel, which originates from concepts of due process as directly guaranteed by the Constitution. *See Waldron v. I.N.S.*, 17 F.3d 511, 518 (2d Cir. 1993) ("Although compliance with our treaty obligations clearly is required, we decline to equate such a provision with fundamental rights . . .").

2. *Petitioner must show how the Vienna Convention violation has prejudiced his case.*

In *Breard*, the United States Supreme Court stated that even if Breard's claim had been properly raised and proven, "it is extremely doubtful that the violation should overturn a final judgment of conviction without some showing that the violation had an effect on the trial." 523 U.S. at __, 1998

U.S. LEXIS 2465, at *9. The idea that a person who alleges a Vienna Convention violation has the burden of establishing prejudice from the alleged violation has been established repeatedly by the Ninth Circuit as well as other federal courts, including Illinois' Central District in *United States v. Chaparro-Alcantara*, 1999 U.S. Dist. LEXIS 2640, No. 98-30070 (C.D. Ill. Mar. 4, 1999). *See, e.g., United States v. Oropeza-Flores*, 1999 U.S. App. LEXIS 5991, No. 98-50305 (9th Cir. Mar. 31, 1999); *United States v. Lombera-Camorlinga*, 1999 U.S. App. LEXIS 5053, No. 98-50347 (9th Cir. Mar. 25, 1999); *United States v. Salas*, 1998 U.S. App. LEXIS 32633, No. 98-4374 (4th Cir. 1998); *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997); *Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996); *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993); *United States of America v. Esparza-Ponce*, 7 F. Supp. 2d 1084 (S.D. Cal. 1998). Without a doubt Mr. Madej must demonstrate how the violation has prejudiced his case.

3. *Petitioner has failed to demonstrate prejudice because he has not proved ineffective assistance of counsel, and his claims that consular notification would have ensured him a better attorney and aggressive consular assistance are merely speculative.*

To establish prejudice, Petitioner must produce evidence that: 1) he did not know his right; 2) he would have availed himself of the right had he known of it; and 3) there was a likelihood that the contact [with the consul] would have resulted in assistance to him. *United States v. Proa-Tovar*, 975 F.2d 592, 594-95 (9th Cir. 1992).

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Petitioner has stated by affidavit that he did not know of his Vienna Convention rights and would have contacted the Polish Consulate had he known to do so. Pet.'s Ex. A. He further asserts that the outcome of his trial would have been different had he been able to avail himself of consular assistance. Specifically, Petitioner alleges that his attorney was incompetent and made numerous mistakes during the trial and sentencing, which would not have occurred had the Petitioner been able to contact the Polish Consulate for guidance and obtained their recommendation of a presumptively competent defense attorney. Petitioner has given Paraguay and Mexico as examples of governments which secured "first class legal representation for their nationals facing capital charges." Based on this, Petitioner claims that the State's noncompliance with the Convention was not harmless error, prejudiced his case, and necessitates the automatic reversal of those same convictions and death sentence. However, Petitioner's argument must fail because, as previously discussed in Part I.A., the Illinois Supreme Court already ruled that Petitioner failed to establish ineffective assistance of counsel in his post-conviction petition. *See Madej*, 177 Ill. 2d at 116. Therefore, this court finds that Petitioner's claim of prejudice from a Vienna Convention violation is speculative at best and evidently an attempt to revisit an issue which has already been clearly resolved by the Illinois Supreme Court.

Furthermore, Mr. Madej's claims are also speculative in the sense that even if he had been told of his Vienna Convention rights, notification of the Polish consulate would not have been automatic, but would have taken place only at his request. To this effect, he has made no showing that would indicate with certainty that he would have requested the

Polish consulate to be contacted.[6] Mr. Madej came to the United States at the age of 1-½ and is a legal permanent resident. He completed first grade through eleventh grade and had a paper route in the United States. He worked at an herb store, gas station, printing press, Jewel Food Store, electronics plant, can company, and packaging company in the United States. He served in the Army in the United States. He committed several, smaller crimes, for which he was arrested and imprisoned, in the United States. And at the time of his arrest for the murder of Barbara Doyle, he had been living in this country for 20 years. Based on this, the court finds that Mr. Madej's situation was significantly different from that of other foreign nationals (e.g. tourists) who may not even speak English and would naturally avail themselves of and rely upon their consulate to help them navigate through an unfamiliar legal system.

Moreover, at the time of Petitioner's arrest and detention, Poland was under communist regime and had the death penalty.[7] Also, Mr. Madej reportedly holds strong anti-communist views, which a psychologist attributed to Mr. Madej's exposure to Poland's history and his upbringing in a family which immigrated to the United States during the

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6. The court has considered Mr. Madej's affidavit in which he states that he would have contacted the Polish Consulate had he been informed of his right to do so. (Pet.'s Exhibit A) The affidavit, standing alone, does not persuade the court that Mr. Madej would have acted in such a way in 1981.

7. Only in 1997 was the death penalty abolished in Poland. Amnesty International Report, *The Death Penalty Worldwide: Developments in 1997*. ACT 50/04/98, April 1998, at 4, <http://www.amnesty.org/ailib/1988/A5000498.htm>.

Stalin era. *See* Report to the Court by Jill Miller, M.S.S.W., June 7, 1991. (Pet.'s Ex. 6) Under the circumstances, Mr. Madej may very well *not* have sought help from the Polish government. Likewise, the communist, Polish government which had the death penalty at that time may not have been willing or capable of securing the first class legal representation for their nationals facing capital charges. Therefore, it is conjecture to claim that Petitioner would have surely contacted his consulate had he been advised of his Vienna Convention rights. For the same reasons, it is also mere speculation to say in hindsight that the Polish government at that time would have aggressively assisted in Petitioner's defense.

In addition, this court is not persuaded by the recent Minnesota case, *Ademodi v. Minnesota*, Court File No. 90063152 (Minn. Dist. Ct. Dec. 21, 1998). In *Ademodi*, a Nigerian national was arrested for his alleged involvement in a drug transaction and was not notified of his Vienna Convention rights. He was later found guilty of a controlled substance crime, but he was eventually convicted of a misdemeanor and sentenced to only one year of probation, which he successfully completed. Ademodi then sought to vacate and expunge his prior conviction because he was denied consular notification. The District Court of Hennepin County granted the motion.

Ademodi is distinguishable from the instant case for several reasons. First of all, the crimes for which Mr. Ademodi and Mr. Madej were convicted could not be more different. Ademodi was convicted of a misdemeanor, whereas Madej was convicted of murder, felony murder, armed robbery, rape, and deviate sexual assault and seeks vacatur

of these convictions. Secondly, the record in *Ademodi* revealed that he would have contacted the Nigerian consul had he been informed of his right to do so in order to protect his citizenship and residency status. *Ademodi* at p. 5. Ultimately, the *Ademodi* court was persuaded by the fact that it was "very likely that the Nigerian Embassy would have responded in a helpful manner when one of its nationals, clear of record or offense, has called upon it for direction and expertise regarding the impact of U.S. immigration laws on its citizens." *Id.* By contrast, as previously discussed, the court is not persuaded that Mr. Madej would have requested the help of the Polish Consulate, or that the Polish government would have responded in a helpful manner.

Since this court has found no prejudice resulting from the alleged violation of the Vienna Convention, this court likewise holds that Mr. Madej's convictions and death sentence are valid. Although this court can envision a situation where a Vienna Convention violation can require reversal of a conviction and sentence, the fact that Petitioner was not prejudiced by the violation is crucial to this court's decision to deny his petition.

III. CONCLUSION

Based on the foregoing discussion, this court finds that Petitioner is barred by the statute of limitations from raising his Vienna Convention and Consular Convention claims. Moreover, even if Mr. Madej's § 2-1401 petition was timely filed, his Consular Convention claim must fail because there was no violation. The Vienna Convention claim would not succeed because Petitioner has not conclusively shown that the denial of consular notification prejudiced or otherwise

changed the outcome of his trial. Similarly, assuming that Petitioner's mandamus action would survive all other procedural attacks, it would fail for the same reason.

Mr. Madej's Vienna Convention claim is premised on the assertion that his attorney's performance was deficient and prejudicial, and the chance to contact the Polish Consulate would have led to the selection of a more competent attorney to handle his death penalty case. However, the Illinois Supreme Court, which no doubt recognizes the qualitative difference between a death sentence and a prison sentence, already concluded that Mr. Madej did not meet the standard for proving ineffective assistance of counsel, despite his attorney's substandard performance during sentencing.

Although this court agrees with Petitioner on the absolute importance of implementing exacting standards of due process in death penalty cases, the court is not prepared to equate a Vienna Convention violation, under these circumstances, with a Miranda violation or a violation of the right to counsel because there is no legal precedent to support such an interpretation. Moreover, this court finds Petitioner's claims, that consular notification would have led to a better attorney and aggressive assistance from his consulate, to be mere speculation. For these reasons, the court must deny Petitioner's and the Consul General's request for vacatur of Mr. Madej's convictions and sentence, as well as the Consul General's request for resentencing.

Even though this court cannot grant Mr. Madej the relief he seeks, his petition has brought much needed attention to the importance of State compliance with the Vienna

Convention. In the past, noncompliance was due to a lack of awareness of such provisions. Presently, heightened awareness of a defendant's right to consular notification has prompted the Cook County State's Attorney's Office to implement certain curative measures regarding foreign national defendants. Beginning February 22, 1999, all foreign national defendants, as determined after review of the arrest report, any information provided by the I.N.S., or any other source of information, will be notified by an assistant state's attorney at the bond hearing or the first court date of the defendant's right to have his/her consulate notified while defendant awaits trial. If the judge does not ask the defendant if he understands this right or wishes his consulate to be notified, the assistant state's attorney must request the judge to make the inquiry. For every defendant who is given this admonition, a form letter must be sent out to the embassy or consulate of the defendant's native country. This admonition and written notification applies to all foreign nationals, whether charged with a felony or a misdemeanor, and whether in custody or on bond.

Accordingly, this § 2-1401 petition for post-judgment relief, or in the alternative, petition for relief from void orders, and the consolidated petition for writ of mandamus, shall be and is hereby denied.

ENTERED: s/ Thomas R. Fitzgerald
Hon. Thomas R. Fitzgerald
Presiding Judge of the Circuit
Court of Cook County
Criminal Division

DATED: May 3, 1999

APPENDIX C — LETTER OF THE SUPREME COURT OF ILLINOIS DENYING PETITION FOR REHEARING DATED NOVEMBER 27, 2000

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

* * *

November 27, 2000

Mr. Charles F. Smith, Jr.
Skadden, Arps, Slate, Meagher & Flom
333 West Wacker Drive
Suite 2100
Chicago, IL 60606

No. 87725 — People State of Illinois et al., appellees, v.
87574 Gregory Madej, appellant (The Counsel
87726 General for the Republic of Poland of
87852 Chicago et al., intervenors/appellants).
Cons. Appeals, Circuit Court (Cook).

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on December 7, 2000.

APPENDIX D — LETTER OF THE SUPREME COURT OF ILLINOIS STAYING MANDATE DATED DECEMBER 19, 2000

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

* * *

December 19, 2000

Mr. Amarjeet S. Bhachu
Skadden Arps Slate Meagher & Flom
333 W. Wacker Drive, Suite 2100
Chicago, IL 60606

In re: People State of Illinois et al., appellees, v. Gregory Madej, appellant (The Counsel General for the Republic of Poland of Chicago et al., intervenors/appellants).
Nos. 87574, 87725, 87726 & 87852 Cons.

Today the following order was entered in the captioned case:

Motion by appellant to stay the mandate of this Court for federal habeas corpus proceedings which were filed in the United States District Court for the Northern District of Illinois. Motion Allowed. It is further ordered that appellant shall provide this Court with periodic reports on the status of the case in federal court by the first day of January, March, May, September and November while the case is pending in federal court.

Appendix D

A report shall contain information which identifies papers filed, including any motions for continuance or extension; hearing dates; and court rulings.

Order entered by Justice Fitzgerald.

Very truly yours,

s/ Juleann Hornyak
Clerk of the Supreme Court

cc: Hon. Jim Ryan
Ms. Arleen C. Anderson
Ms. S. Adele Shank
Mr. John Quigley
Mr. Ali Naseem Bajwa
Mr. Michael Engelhard
Mr. Walter A. Hess
Mr. Douglass W. Cassel, Jr.
Mr. Charles F. Smith, Jr.